IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 7TH AUGUST 2007 / 16TH SRAVANA 1929

CRL.A.No. 1936 of 2004()

SC.570/1999 of ADDL. SESSIONS COURT (ADHOC)-I, KOLLAM

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APPELLANT: ACCUSED:

JOY, SO. JOSEPH, VILAYILVILAKAM VEEDU,
PURICHERI, KODUVILA MURI, EAST KALLADA VILLAGE.

BY ADV. SRI.C.RAJENDRAN

RESPONDENTS: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
S.I. OF POLICE EAST KALLADA POLICE STATION
(CRIME NO.113/1998) THROUGH PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON ON 07/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1936 OF 2004

Dated this the 7th day of August, 2007.

JUDGMENT

The appellant is the accused in S.C.No.570/1999 on the file of the Additional District and Sessions Judge (Adhoc)-I, Kollam. The Sub Inspector of Police, East Kallada Police Station filed a charge against the appellant under Section 55(a) of the Abkari Act on the allegation that he was found in possession of 4 liters of arrack on 11.7.1998 at about 11 a.m in contravention of the provisions of the Abkari Act and the Rules made therein and further it was alleged that the appellant was engaged in selling arrack holding MO2 glass and thereby committed the offence punishable under Section 55 (a) of the Abkari Act. To prove the prosecution charge against the appellant, four witnesses were examined and Exts.P1 to P4 were also relied on by the prosecution. MO1 black cannas and MO2 glass were also produced. Neither any witness was examined nor any document produced on behalf of the defence. But, while the appellant was questioned under Section 313 he denied the charge and had stated that he was arrested from his house and he is innocent. But, the trial court, relying on the evidence of Pws 3

and 4, found the appellant guilty under Section 55 (a) of the Abkari Act and he was convicted thereunder and sentenced to undergo R.I for four years and to pay a fine of Rs. One lakh with default sentence of payment of fine, to undergo S.I for a further period of one year. The benefit under Section 428 was also allowed to the appellant. Against the judgment of the trial court, the appellant filed this appeal.

2. This Court heard Sri. C. Rajendran, the learned counsel appearing for the appellant and Public Prosecutor for the State. The counsel appearing for the appellant had taken the following contentions before this Court challenging the judgment of the trial court. Firstly, it is contended that the finding of the court that the appellant had committed an offence punishable under Section 55 (a) of the Abkari Act is legally not tenable in the light of the judgments of this Court reported in **Surendran v. Excise Inspector** (2004 (1) KLT 404) and **Sudhepan @ Aniyan v. State of Kerala** (200592) KLD Crl. 631). Secondly, it is contended that the trial court committed a serious error in finding the appellant guilty of the charge placing reliance on the evidence of Pws 3 and 4, who are the official witnesses, as the independent witnesses examined as Pws 1 and 2

turned hostile to the prosecution and had not supported the prosecution case at all. Thirdly, it is contended that while detecting the offence, PW4 had not complied with the provisions of the Abkari Act as well as the provisions of Kerala Excise Manuel as there was no evidence before the court to show that MOk1 cannas was seized and the sample was taken from the arrack as per Ext.P1 mahazar. Lastly, it is contended that as per the principles laid down by this Court in the judgments reported in **Dominic v. State of Kerala** (1989 (1) KLT 601) and **Narayani v. Excise Inspector** (2002 (3) KLT 725) the finding of the court that the prosecution had succeeded in proving that MO1 and MO2 were seized in accordance with the provisions of the Act is perverse as there was no evidence before the court to show that both the contraband and the sample reached the court at the earliest and either PW3 and PW4 had not given any explanation for the delay in sending the contraband as well as the sample to the court and these witnesses were not also offered any evidence regarding keeping of the contraband and the sample in safe custody till the same were produced before the court so as to rule out the chances of substitution of the sample and the contraband.

3. Before considering the contentions raised by the counsel for

the appellant, the brief prosecution case can be considered by this Court. According to PW4 - the Sub Inspector of Police, himself, PW3 and other police officials were on patrol duty on 11.7.1998 and when they reached at a place called Koduvila muri, East Kallada, PW4 and other officials had noted that the appellant was standing by the side of the road by holding MO1 cannas and MO2 glass. When the appellant had seen the police party he tried to escape from the scene. However, he was stopped and questioned and it was revealed from the questioning that he was selling arrack which contained in MO1 cannas. The further evidence adduced by PW4 would show that on preparation of Ext.P1 mahazar, MO1 cannas was seized from the appellant and that MO1 contained about 4 liters of arrack, out of which the sample was also taken for analysis. This witness has stated that both the sample and Mo1 were sealed in the presence of the independent witnesses and thereafter the appellant was arrested and the case was registered against the appellant. This witness has further stated that the sample was got analysed and as per Ext.P4 chemical report it was reported that the sample contained 19.3% alcohol by volume and hence the final charge filed. The evidence of PW4 was also tried to be corroborated with the evidence of PW3 -the head constable, who

accompanied PW4. The trial court relied on the evidence of these two witnesses and found that the appellant was found in possession of Mo1 which contained 4 liters of arrack.

4. The contention of the learned counsel for the appellant that even if the evidence of PW3 and PW4 is accepted in the light of the principles laid down by this Court in **Surendran's and Sudhepan's cases** (cited supra), the prosecution had failed to prove that the appellant was found in possession of the arrack in connection with transport, export or transit of the same as contemplated under Section 55(a) of the Act. In the above two judgments, this Court had categorically held that to attract an offence under Section 55(a) of the Act, the prosecution should prove by adducing evidence that the contraband was found in possession of an accused in connection with transport, export or import of the same. The facts of the case in hand would show that the specific allegation put against the appellant was that he was holding MO1 and selling arrack to the public. But there was no evidence adduced before the court either the appellant had sold any arrack to anybody and no witness on that ground was also examined. If so, the allegation that the appellant was selling arrack was not proved. If so, the finding of

the court that the appellant committed the offence under Section 55 (a) is not legally sustainable. However, the prosecution case against the appellant is that he was found in possession of 4 liters of arrack in contravention of the provisions of the Abkari Act and the Rules framed thereunder. Possession of arrack in any form is an offence punishable under Section 8(2) of the Act. If so, in case the evidence of Pws 3 and 4 is acceptable to prove that the appellant was in possession of 4 liters of arrack, no doubt the appellant could be punished under Section 8(1) read with Section 8(2) of the Abkari Act. The criticism against the evidence of Pws 3 and 4 is that their evidence cannot be made as a basis for finding that the appellant was in possession of MO1 which contained 4 liters of arrack as there was no independent witness to support their evidence. Admittedly, the prosecution examined Pws 1 and 2, the two independent witnesses, who turned hostile to the prosecution. However, there is no rule that the prosecution could not prove its case on the evidence of the investigating officers if their evidence is free from any infirmity. The counsel appearing for the appellant submits that PW4 had not complied with the provisions of the Abkari Act or the Kerala Excise Manuel while detecting the offence against the appellant as this witness had not given any

evidence regarding the labeling, sealing of the sample as well as the contraband article alleged to have been seized from the appellant. It is also contended by the counsel that as per Ext.P1 mahazer, there is no statement regarding labeling or sealing of Mo1 or the sample alleged to have been taken by PW4. In this context, it has to be noted when PW4 was examined before the court that he had sealed MO1 and the sample but when it was produced before the court there was no seal of PW4 on MO1. Apart from that, he had no case that he had labeled the sample and MO1 and got signed by the appellant or any independent witnesses. In the above circumstances, while detecting the offence, PW4 had violated the provisions of the Abkari Act as well as the provisions of the Kerala Excise Manuel. As per **Dominic's case** (cited supra) this Court categorically held that it is the duty of the officer while taking action under the provisions of the Abkari Act to take the sample and the contraband article and label the same and also seal the same and get the signatures of the independent witnesses so as to enable the court that the sample produced is same as seized from the contraband. The evidence of Pws 3 and 4 gives no confidence to the court to believe them that MO1 was seized from the appellant as stated in Ext.P1. It is to be noted that the alleged seizure was

on 11.7.1998 at 11 a.m whereas, Ext.P3 property list shows that the contraband MO1 and the sample reached the court only on 16.7.1998. There is no explanation offered by the prosecution for the delay in reaching MO1 and the sample before the court. Apart from that, either PW4 or PW3 had given any evidence to show that the contraband and the sample were kept in safe custody till the same were given to the court for chemical analysis. Ext.P4 chemical report would show that the sample was sent for chemical analysis only on 9th November, 1998, that is after four months. It is also to be noted that when Mo1 and the sample were produced before the court on 16.7.1998 the court had sent the same back to the police officer to keep in safe custody and there was no evidence either from PW3 or PW4 that the sample and the contraband were kept in safe custody till the same sent back to the court. This question has considered by this Court in **Narayani's case** (cited supra) and this Court said that it is the duty of the prosecution to prove that both the residue and the sample were kept in safe custody till the same were produced before the court so as to rule out the chances of substitution of the same. Even though the case set up by the appellant under Section 313 is a denial, he had a case that he was arrested from his house and he is innocent and the case

was foisted against him by the police. In the above circumstances also, the evidence of Pws 3 and 4 would not give confidence to the court to hold that MO1 was seized from the appellant as alleged by the prosecution. All these circumstances give a reasonable doubt to the entire prosecution case. In this context, evidence of Pws 1 and 2- the two independent witnesses is also very relevant as they have stated before the court that they have not seen anything seized from the appellant. Even though they turned hostile to the prosecution, the facts now proved before the court would show that what they said before the court might be true. In the above circumstances, reasonable doubt regarding the prosecution case exists. If so, the benefit of doubt shall be given to the appellant.

In the above circumstances, this Court is of the view that the prosecution had not proved even an offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act. The finding of the trial court that the appellant had committed an offence punishable under Section 55(a) of the Act is set aside and the conviction entered against the appellant is liable to be set aside. Accordingly, the appeal is allowed and the appellant is found not guilty of any offence. The appellant/accused in S.C.No.570/1999 of

the Additional District and Sessions Judge (Adhoc)-I, Kollam shall be released forthwith, if he is not required to be kept in jail in connection with any other case.

K. THANKAPPAN, JUDGE.

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